Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO., and THE LADY ELGIN FOUNDATION, INC.,

Petitioners,

v.

ILLINOIS HISTORIC PRESERVATION AGENCY, and ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROLAND W. BURRIS
Attorney General, State of Illinois
ROSALYN B. KAPLAN
Solicitor General, State of Illinois
RITA M. NOVAK
Assistant Attorney General
Counsel of Record
JENNIFER A. KELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2129
Attorneys for Respondents

Printed by Authority of the State of Illinois (P.O. 35618—60—10-22-92)

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Does the Eleventh Amendment bar the district court from adjudicating Illinois' interest in the historic shipwreck of the "Lady Elgin"?

LIST OF PARTIES

Harry Zych, d/b/a American Diving and Salvage Co., was the plaintiff below and is a petitioner in this Court. The Lady Elgin Foundation, Inc., intervened as a claimant below, and is a petitioner in this Court.

The Illinois Historic Preservation Agency and the Illinois Department of Transportation were granted leave to intervene, both as of right and permissively, by the district court and they are respondents in this Court.

The *res* named by Harry Zych as the subject of this litigation is the "unidentified, wrecked, abandoned vessel, believed to be the 'Lady Elgin' which sank in 1860, her engines, boilers, machinery, tackle, apparel and cargo, located within five miles of a point at coordinates 42 degrees, 11 minutes north latitude, 87 degrees, 39 minutes west longitude." (Complaint, R. Doc. 1)

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Introduction	1
Proceedings Below	3
REASONS FOR DENYING THE WRIT	10
THE COURT OF APPEALS CORRECTLY HELD THAT A STATE NEED NOT LITIGATE THE "COLORABILITY" OF ITS CLAIM TO A *RES* TO INVOKE THE ELEVENTH AMENDMENT AS A BAR TO ADJUDICATION OF ITS INTEREST IN THAT *RES*	10
A. This Case Presents No Issue Left Undecided By This Court In *Florida Dept. Of State v. Treasure Salvors, Inc.*	10
B. The Decision Of The Court Of Appeals Is Not Overly Broad, Inconsistent Or Self-Contradictory	13
C. Illinois' Ownership Of The Lady Elgin Is A Hotly Disputed Issue	15
D. The "Showdown Between Zych And Illinois [Is Occurring] In State Rather Than Federal Court"	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	PAGE
Cobb Coin Co. v. Unidentified, etc. Vessel, 549 F. Supp. 540 (S.D. Fla. 1982)	13
Ex Parte Young, 209 U.S. 123 (1908)	13
Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989)	13
Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)	10-13
Florida v. Treasure Salvors, Inc., 689 F.2d 1254 (5th Cir. 1982) (on remand)	13
Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983)	13
People of the State of Illinois ex rel. Illinois Historic Preservation Agency and Department of Transportation v. Harry Zych, doing business as American Diving and Salvage Co., Lady Elgin Foundation, Inc., an Illinois not-for-profit corporation, and Cigna Property and Casualty Insurance Co., a Connecticut corporation, No. 92 CH 8493 (Circuit Court of Cook County, Illinois, County Department, Chancery Division)	16
Sindia Expedition v. The Sindia, 895 F.2d 116 (3d Cir. 1990)	13
Treasure Salvors, Inc. v. The Atocha, 569 F.2d 330 (5th Cir. 1978)	11
Zych v. Wrecked Vessel Believed to be the "Lady Elgin" etc., et al., 960 F.2d 665 (7th Cir. 1992)	13

Constitutional Provision

U.S. Const. amend. XI ..... *passim*

Statutes

The Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.* 14

The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* 14

The Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 133c.01 *et seq.* (1991) ... 14-15

The Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991) 15

The Human Skeletal Remains Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 2660 *et seq.* (1991) 15

Other

13 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3524 at 157 (2d ed. 1984) 10

No. 92-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO., and THE LADY ELGIN FOUNDATION, INC.,

Petitioners,

v.

ILLINOIS HISTORIC PRESERVATION AGENCY, and ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

Under the heading "Facts" in their Joint Petition for Writ of Certiorari, petitioners Harry Zych and the Lady Elgin Foundation, Inc. state:

> One fact, however, is crucial. It is that the *Lady Elgin* is not and never has been an "abandoned" wreck. The Court of Appeals here expressly noted that the ship was insured by Aetna Insurance Company at the time of her loss, that Aetna paid the

> owner of the vessel for the loss and thereby acquired title to the wreck by subrogation, and that Aetna instructed its agents not to abandon the *Lady Elgin*. (Slip op. at 3, App. 4). In 1990, petitioner Lady Elgin Foundation purchased title to the wreck from CIGNA Insurance Company, Aetna's successor. (Slip op. at 5, App. 6)

(Jnt. Pet. 4)[1] Whether or not the Lady Elgin is or has ever been abandoned has yet to be litigated as between the adverse parties before this Court. This issue will be determined in the course of the lawsuit currently pending between these parties in state court. (*See infra* at 16) Respondents, the Illinois Historic Preservation Agency and the Illinois Department of Transportation, maintain that the Lady Elgin was and is abandoned.

The issue of "abandonment" has only been litigated as between petitioners themselves (*see infra* at 8), concerning which the Court of Appeals stated:

> Once the district court dismissed Zych's claims against Illinois, there followed litigation between Zych and the Foundation having at most the trappings of adversariness. Zych contended that the Lady Elgin is an abandoned shipwreck, and the Foundation contended that it is not. The district court ruled for the Foundation, concluding that Aetna, which instructed its agents not to abandon the Lady Elgin, never intentionally surrendered its interest as subrogee of the vessel's owner. 755 F. Supp. 213 (1991); 1990 U.S. Dist. LEXIS 16760.

(App. 6)

---

[1] Respondents cite to the Joint Petition for Writ of Certiorari as "Jnt. Pet. ____." Respondents cite to the Appendix in the Joint Petition for Writ of Certiorari as "App. ____."

Proceedings Below

On August 28, 1989, Zych filed an *in rem* action pursuant to 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h). (R. Doc. 1) In the caption of the complaint, he described the wreck as "the unidentified, wrecked, and abandoned vessel" believed to be the Lady Elgin. (*Id.*) He also described the wreck as "abandoned" three more times in the body of the complaint. (*Id.* at ¶¶ 3, 6, 7)

Zych sought to be declared the owner in possession of the wreck under the common law of "finds." (*Id.* at ¶ 10) In the alternative, he sought a salvage award for the work he had performed on the wreck. He prayed:

> 1. that he "be put into possession of the wreck and other property, and that all other persons, firms, and corporations or governmental agencies be enjoined from interfering with [his] title, possession and property";
>
> 2. that his "title or salvage award be confirmed against all claimants and all the world";
>
> 3. that "all governments, governmental agencies, states, persons, firms or corporations claiming an interest in the wreck be cited to appear . . . and show cause why possession should not be delivered to [him], as having full title and that [he] be put into full possession and its title confirmed"; and
>
> 4. that, in the alternative, he "be awarded a full and liberal salvage."

(*Id.* at pp. 2-3)

The district court entered an order directing issuance of a warrant for arrest of the shipwreck *in rem* on August 28, 1989. (R. Doc. 5) On October 5, 1989, Zych moved for an order of default. (R. Doc. 13)

Before the district court could rule on the default motion, the Illinois Historic Preservation Agency ("IHPA") and the Illinois Department of Transportation ("IDOT") (collectively "Illinois") moved to intervene and enter a restricted appearance pursuant to Rule E(8) of the Supplemental Rules of Admiralty and Maritime Claims. Illinois sought to contest the district court's jurisdiction to adjudicate its interest in the Lady Elgin. (R. Doc. 19) The court granted Illinois' request to intervene for the limited purpose of contesting its jurisdiction on July 18, 1990, finding Illinois to have satisfied the requirements for both intervention as of right and permissive intervention. (R. Doc. 100)

IDOT has jurisdiction over and responsibility for all of the rivers and lakes of Illinois in which Illinois or its people have any right or interest. Ill. Rev. Stat. ch. 19, ¶ 52 (1991). IDOT is also the trustee empowered to exercise jurisdiction and control over the bed of Lake Michigan which is held in trust for the people of Illinois. Ill. Rev. Stat. ch. 19, ¶ 71 (1991).

IHPA bears responsibility for maintaining historically significant properties and historic interests of Illinois. Ill. Rev. Stat. ch. 105, ¶ 533a (1991). IHPA also has the exclusive right to regulate, explore, excavate or survey archaeological resources, including shipwrecks, found upon or within any public lands. Ill. Rev. Stat. ch. 127, ¶¶ 133c1, 133c.02 (1991).

Illinois contested the district court's jurisdiction to adjudicate its interest in the Lady Elgin. (R. Doc. 19) Illinois also filed a Fed. R. Civ. P. 12(b)(1) motion to dismiss petitioner Zych's suit in its entirety. (R. Doc. 19, Exh. A; R. Docs. 22, 35) Illinois claimed an interest in the shipwreck under the Abandoned Shipwreck Act of 1987, 43

U.S.C. §§ 2101 *et seq.*, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.*, the Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 133c.01 *et seq.* (1991), the Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991), and the Human Skeletal Remains Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 2660 *et seq.* (1991). (R. Doc. 22 at 3) It then advanced the Eleventh Amendment as a bar to the adjudication of its interests in federal court, and further asserted that it was an indispensable party without which the district court could not adjudicate petitioner Zych's claim of title to the shipwreck. (R. Docs. 22 at 5-6, 35) Therefore, Illinois sought dismissal of Zych's suit in its entirety.

Illinois' intervention and claim to the shipwreck presented petitioner Zych with the following problem described by the Court of Appeals:

> To show entitlement to salvage or ownership under the law of finds, [Zych] needed to show that the Lady Elgin is an abandoned wreck. If it is, then Zych prevails over all other private claimants but the state may take the prize. If the Lady Elgin is an abandoned wreck, then the eleventh amendment may prevent litigation against Illinois in federal court, and if he moves to state court Illinois has a powerful claim on the merits, subject to the requirement that it show that the wreck is "embedded", see § 2105(a)(1) and *The Seabird*, 941 F.2d at 529-30. If, however, the wreck is not abandoned, then other private persons may have claims superior to Zych's.

(App. 5-6)

"To hedge his bets" (App. 6), Zych, "and some friends" (*id.*), formed the Lady Elgin Foundation, Inc. on January 12, 1990, "in order to pursue another avenue of gaining possession of the wreck" (R. Doc. 110 at 4; R. Doc. 112, Exh. A). Zych served as its executive director, his wife

served as its secretary, and a friend served as its treasurer. (R. Doc. 112, Exh. C) Zych's attorney also served as the attorney for the Foundation. (R. Doc. 83)

While Zych had alleged that the Lady Elgin was abandoned, his Foundation asserted that the ship had not been abandoned and that it had title to the shipwreck. (*Id.*) The Foundation maintained that the Aetna Insurance Company ("Aetna") had obtained title to the ship in 1860 when it paid on the loss of the ship, and that CIGNA Property and Casualty Insurance Co. ("CIGNA"), the successor to Aetna, had executed an agreement with the Foundation whereby it had transferred its ownership interest to the Foundation in return for twenty percent of the proceeds of the sale of property and artifacts from the shipwreck. (*Id.*) The Foundation, in turn, contracted with Zych for salvage of the ship. (*Id.*)

On May 2, 1990, Zych's Foundation sought leave to intervene in Zych's suit. (R. Doc. 83) As an alternative to this motion, the Foundation, on August 16, 1990, moved for leave to file a claim of ownership to the wreck pursuant to Rule 6(C) of the Supplemental Rules for Admiralty and Maritime Claims, and an answer to Zych's complaint. (R. Docs. 103, 104, 105)

On September 13, 1990, and prior to ruling on the Foundation's motion to intervene, the court dismissed Zych's complaint against Illinois with prejudice. (App. 73) The court determined that Illinois had a "colorable" claim of title to the shipwreck and, therefore, that the Eleventh Amendment barred adjudication of its interest in the ship. (App. 50-70) The court further ruled that Illinois had not waived its Eleventh Amendment immunity by appearing in the case and seeking to protect its interests. (App. 70-73)

The court declined to dismiss the case in its entirety, although it expressed doubt as to whether a "case or controversy" existed as between Zych and his Foundation (App. 74), a relationship the Court of Appeals subsequently described as "having at most the trappings of adversariness" (App. 6). The court ordered Zych and his Foundation to file written reports addressing why the case was not then rendered moot by the presence of Zych both as a plaintiff and as executive director of the Foundation, whose interest was purportedly adverse to Zych's. (App. 74 n.16) The court also ordered Zych's attorney to explain how he could continue to represent both Zych and Zych's Foundation, which was opposing Zych's claim to the shipwreck. *Id.* Finally, it requested Zych to inform it how the case could continue following Illinois' dismissal from the suit. *Id.*

Zych's attorney responded to the court's request on September 21, 1990. (R. Doc. 112) He stated that a case or controversy existed between the parties. (*Id.* at 2-4) He submitted copies of the Foundation's certificate of incorporation (*id.* at Exh. A), and its corporate by-laws (*id.* at Exh. B). He also submitted the minutes of the Foundation's Board of Directors meeting of September 20, 1990, at which meeting Zych resigned as executive director of his Foundation and was appointed its secretary, his friend resigned as treasurer and was appointed executive director, and his wife resigned as secretary and was appointed to serve as treasurer. (*Id.* at Exh. C) Zych's attorney stated that he perceived no ethical problem in representing both Zych and his Foundation, that a case and controversy existed between Zych and his Foundation, and that both Zych and his Foundation waived their right to separate counsel. (R. Doc. 112 at 2-4, and Exhs. D & E) Zych's attorney also urged the district court to reconsider its dis-

missal of Zych's claims as against Illinois. (R. Doc. 112 at 4-5)

On September 26, 1990, the court issued a minute order and memorandum opinion declining to reconsider its dismissal of the action as against Illinois. (R. Docs. 113, 114) The court also permitted the Foundation to file a claim of title to the shipwreck. (R. Doc. 114) It conditioned the Foundation's right to proceed in the case upon its retention of independent counsel and upon Zych's continued pursuit of his claim to title in the ship. (R. Doc. 113 at 3-4)

On November 19, 1990, the Foundation submitted its memorandum in support of its claim to the shipwreck (R. Doc. 118), and Zych filed his response in opposition to the Foundation's claim of title to the Lady Elgin. (R. Doc. 117) The Foundation submitted with its memorandum a stipulated statement of facts. (R. Doc. 118)

On November 26, 1990, the district court requested the United States, which had been granted leave to intervene as of right for the purpose of defending the constitutionality of the Abandoned Shipwreck Act of 1987 (R. Doc. 99), and Illinois to appear at a status hearing to discuss their involvement in the action between Zych and his Foundation. At the hearing, both the United States and Illinois declined to participate. Illinois did so on the ground that the suit had already been dismissed with prejudice as against it on Eleventh Amendment grounds. (R. Doc. 128 at 10, 11)

On December 11, 1990, the district court entered judgment declaring that "the Foundation is the sole owner of the shipwrecked Lady Elgin." (App. 35) The court stated that Illinois, by declining to participate in the November 26, 1990 hearing, had waived its opportunity to respond to the Foundation's claim of title to the shipwreck. (App. 32-34)

The following day, December 12, 1990, the district court entered an order vacating that portion of its September 13, 1990 order dismissing the suit as against Illinois. (R. Doc. 130)

Illinois moved, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the court's December 11, 1990, judgment. (R. Docs. 131, 132) Illinois sought to make clear that the order, consistent with the Eleventh Amendment, did not adjudicate its interest in the Lady Elgin. (*Id.*) Illinois also moved, in the alternative, to vacate the December 11, 1990 judgment pursuant to Fed. R. Civ. P. 60(b)(4), arguing that if the December 11, 1990 judgment did adjudicate Illinois' interest, it was void as violative of the Eleventh Amendment. (*Id.*)

On January 4, 1991, the court entered an order denying Illinois' motion, but granting an agreed motion filed by Zych and his Foundation to clarify that the court retained jurisdiction to adjudicate Zych's claim for a salvage award. (App. 24-35)

On February 12, 1991, Zych filed a motion for preliminary and permanent injunctive relief prohibiting any person from interfering with his exclusive salvage rights. (R. Doc. 146) On March 11, 1991, the district court granted Zych a preliminary injunction. (R. Doc. 149)

Illinois filed a notice of interlocutory appeal from this order, as well as from previously entered orders essential to the preliminary injunction order, on March 25, 1991. (*See* App. 7)

On May 3, 1991, the district court *sua sponte* extended the effective date of the preliminary injunction during the pendency of the appeal. The court also stayed Zych's right to commence salvage operations during the pendency of the appeal.

On April 3, 1992, the United States Court of Appeals for the Seventh Circuit vacated the district court's preliminary injunction order. (App. 1-11) The Court of Appeals held that the district court was without jurisdiction under the Eleventh Amendment to adjudicate Illinois' interest in the wreck of the Lady Elgin.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY HELD THAT A STATE NEED NOT LITIGATE THE "COLORABILITY" OF ITS CLAIM TO A *RES* TO INVOKE THE ELEVENTH AMENDMENT AS A BAR TO FEDERAL ADJUDICATION OF ITS INTEREST IN THAT *RES*.

A. This Case Presents No Issue Left Undecided By This Court In *Florida Dept. Of State v. Treasure Salvors, Inc.*

Contrary to the petitioners' contention (Jnt. Pet. 7), and as correctly explained by the Court of Appeals (App. 9-10), this case presents no issue left undecided in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) ("*Treasure Salvors*"). Indeed, eight justices agreed that the Eleventh Amendment prevents a federal court from adjudicating whether a State owns property, irrespective of the "colorability" of the State's claim to the property, absent the State's consent. 458 U.S. at 699-700 (Stevens, J., joined by Burger, C.J., and Marshall and Blackmun, JJ.); 458 U.S. at 702-703 (White, J., joined by Powell, Rehnquist and O'Connor, JJ.). *See* 13 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3524 at 157 (2d ed. 1984). The holding in *Treasure Salvors* is dispositive of the instant case.

In *Treasur Salvors,* a diver located a 17th century Spanish galleon on the floor of the ocean more than three miles off Florida's coast. Litigation between the finder and

the United States resulted in the determination that the wreck was located in international waters. *Treasure Salvors, Inc. v. The Atocha*, 569 F.2d 330 (5th Cir. 1978). Following this determination, the district court issued a warrant for the arrest of certain artifacts from the galleon that were in the possession of two Florida officials. The State of Florida intervened and moved to quash the warrant on the ground that the Eleventh Amendment barred the action. The district court denied the motion and rejected Florida's claim of ownership. The Court of Appeals for the Fifth Circuit affirmed.

This Court granted certiorari to review the following question: "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." 458 U.S. at 682. The Court answered that question in two parts:

> We hold that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

Id.

Justice Stevens authored the plurality opinion, which was joined by Chief Justice Burger and Justices Marshall and Blackmun. He declared that "the Court of Appeals improperly adjudicated the State's right to the artifacts," and concluded "[t]o the extent that the court determined the State's ownership of the artifacts as part of its Eleventh Amendment analysis, its judgment is reversed." *Id.* at 700.

Justice White, who was joined by Justices Powell, Rehnquist and O'Connor, concurred in the part of the judgment concerning the lower court's lack of authority to have adjudicated the State's interest in the artifacts. *Id.* at 702-703 and n. *. Justice White explained:

> The appellate court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. By holding that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent," [citation omitted] the Court properly rejects this novel conception of the Eleventh Amendment.* The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a State are permitted by the eleventh amendment if the result is that the State loses." [Citation and footnote omitted.]

Id. at 702-703. In the footnote to this discussion, Justice White stated: "I therefore concur in the judgment of the Court only insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. On this point, all Members of the Court, except Justice Brennan, are in agreement." *Id.* at 703 n. *. Justice Brennan maintained that the Eleventh Amendment did not apply because the plaintiffs were Florida citizens. *Id.* at 700-702.

No member of the Court expressed the view that a State must litigate the "colorability" of its claim to property in federal court before successfully invoking the Eleventh Amendment as a bar to adjudication of its in-

terests. Justice Stevens, writing for the plurality, discussed "colorability" only in the context of determining whether the district court, in issuing process against the State officials, had actually issued process against the State under the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. Significantly, although concluding that the State officials had no "colorable" basis on which to retain possession of the artifacts, thereby upholding issuance of the warrants, Justice Stevens unequivocally declared that the lower court was without jurisdiction to have adjudicated the State's claim of title to the artifacts.

Response to the Court's holding in *Treasure Salvors* has not been "inconsistent and confused" as petitioners contend. (Jnt. Pet. 9) The erroneous interpretations of one district court, *Cobb Coin Co. v. Unidentified, etc. Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982), and the Court of Appeals for the Third Circuit in one case, *Sindia Expedition v. The Sindia*, 895 F.2d 116 (3d Cir. 1990), stem not from the unsettled status of the law, but from a misreading and misunderstanding of the Court's decision. Courts that have properly read the *Treasure Salvors* opinion have applied it correctly and consistently. *Zych v. Wrecked Vessel Believed to be the "Lady Elgin" etc., et al.*, 960 F.2d 665, 669-70 (7th Cir. 1992) (App. 9-10); *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989); *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (1st Cir. 1983); *Florida v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1255-56 (5th Cir. 1982).

B. The Decision Of The Court Of Appeals Is Not Overly Broad, Inconsistent Or Self-Contradictory.

Petitioners assert that the Court of Appeals' statement that "[a] judgment declaring that the state possesses no

interest in particular property is a judgment 'against one of the United States' for Constitutional purposes" is overly broad. (Jnt. Pet. 11) They fail, however, to explain in what sense they believe it to be overly broad, and they cite no authority in support of their assertion.

The Court of Appeals reasoned, entirely consistently, that once Illinois asserted an interest in the wreck of the Lady Elgin, the Eleventh Amendment operated as a bar to adjudication of Illinois' interest, irrespective of the strength or merit of Illinois' claim. (App. 7, 10, 11) The Court of Appeals unequivocally, and correctly, rejected the argument—advanced by petitioners here and below—that Illinois must prove in federal court that its claim of title to the wreck is "colorable" before it can successfully invoke the Eleventh Amendment as a bar to the suit. Each of the Court of Appeals' statements quoted by petitioners reflects this view. To the extent petitioners contend otherwise, they misread the Court of Appeals' opinion. (Jnt. Pet. 11-13)

Finally, the Court of Appeals correctly stated that there is no doubt Illinois has a claim to the wreck of the Lady Elgin. (App. 11) The Lady Elgin sank in Lake Michigan off the coast of Illinois in 1860. (App. 2) Petitioners Zych and his Foundation conceded that the wreck is at least on (if not embedded in) State submerged lands. (Appellees' brf. of Zych and his Foundation at 25) The wreck was lost for nearly 130 years. (R. Doc. 1 at ¶ 4) Zych described it as abandoned in the caption of his complaint and he alleged it to be abandoned throughout the complaint. (R. Doc. 1 at ¶¶ 3, 6, 7) Illinois claimed an interest in the shipwreck under the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.*, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.*, the Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127,

¶¶ 133c.01 *et seq.* (1991), the Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991), and the Human Skeletal Remains Protection Act, Ill. Rev. Stat., ch. 127, ¶¶ 2660 *et seq.* (1991). (R. Doc. 22 at 3)

Zych and his Foundation clearly sought to adjudicate Illinois' interest in the wreck. Indeed, Zych's complaint prayed:

> 1. ". . . that all other persons, firms, and corporations or *governmental agencies* be enjoined from interfering with [Zych's] title, possession and property";
>
> 2. that "title or salvage award be confirmed against *all claimants* and *all the world*";
>
> 3. that "all *governments*, *governmental agencies*, *states*, persons, firms or corporations claiming an interest in the wreck be cited to appear . . . and show cause why possession should not be delivered to [Zych], as having full title and that [he] be put into full possession and its title confirmed"; and
>
> 4. that, in the alternative, he "be awarded a full and liberal salvage."

(R. Doc. 1 at ¶ 10) (Emphasis added.) Illinois was also the "principal target" of the district court's injunction. (App. 11) Zych and his Foundation sought to conclusively adjudicate the merits of Illinois' interests in this case and they sought to forever bind Illinois to the district court's adjudication of title to the wreck. (Appellees' brf. of Zych and his Foundation at 8-10)

C. Illinois' Ownership Of The Lady Elgin Is A Hotly Disputed Issue.

Petitioners next assert that "[i]t is beyond argument that the State of Illinois has no 'conceivable' or colorable claim to the Lady Elgin," and that "[t]he undisputed fact

is that the vessel is and always has been owned by private parties, namely CIGNA and the Lady Elgin Foundation." (Jnt. Pet. 14) To the contrary, these are hotly disputed issues and they currently are the subject of the on-going state court action discussed below.

D. The "Showdown Between Zych And Illinois [Is Occurring] In State Rather Than Federal Court."

The Seventh Circuit concluded its opinion with the observation "The showdown between Zych and Illinois will occur in state rather than federal court." (App. 11) That showdown is currently underway. Illinois filed suit to adjudicate its title to the Lady Elgin on September 2, 1992. *People of the State of Illinois ex rel. Illinois Historic Preservation Agency and Department of Transportation v. Harry Zych, doing business as American Diving and Salvage Co., Lady Elgin Foundation, Inc., an Illinois not-for-profit corporation, and Cigna Property and Casualty Insurance Co., a Connecticut corporation*, No. 92 CH 8493 (Circuit Court of Cook County, Illinois, County Department, Chancery Division). Thus, contrary to petitioners' assertion, this controversy will be resolved in a state forum. (Jnt. Pet. 15-16)

CONCLUSION

For all of the foregoing reasons, the Court should deny the Joint Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General, State of Illinois
ROSALYN B. KAPLAN
Solicitor General, State of Illinois
RITA M. NOVAK
Assistant Attorney General
Counsel of Record
JENNIFER A. KELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2129
Attorneys for Respondents